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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/057,107	01/25/2002	Nico N. Raczek	01/018 NUT	2752
7590	04/21/2005		EXAMINER	
ProPat, L.L.C. 2912 Crosby Road Charlotte, NC 28211-2815			WARE, DEBORAH K	
			ART UNIT	PAPER NUMBER
			1651	

DATE MAILED: 04/21/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/057,107	RACZEK, NICO N.	
	Examiner	Art Unit	
	Deborah K. Ware	1651	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 24 January 2005.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1, 3-6-8-10 and 16-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1,3-6,8-10 and 16-21 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____.



DETAILED ACTION

Claims 1, 3-6, 8-10 and 16-21 are presented for examination on the merits.

Response to Amendment

The amendment filed January 24, 2005, has been received and entered.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Election/Restrictions

Applicant's election without traverse of Group I in the reply filed on July 22, 2004, is acknowledged. Non-elected claims have been canceled.

Foreign Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 3-6, 8-10, 16 and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kaesler et al in view of Farmer, both cited on the previously enclosed PTO-892 Form, and in further view of newly cited DE003500187.

Claims are discussed above.

Kaesler et al teach a solution comprising sorbic acid and probiotic. The product solution can be added to feestuffs. Note col. 3, lines 1-6 and 59 and col. 4, lines 62-64. Enzymes can be added too. An acid is disclosed to be contained in an amount of about 90%, see column 2, all lines and the entire abstract.

Farmer teaches a probiotic microorganism such as bacteria selected from *Bacillus subtilis*, note col. 13, lines 29-30. The microorganism probiotic can be selected and used in a composition such as feed, note col. 24, lines 45-65 and further enzymes may be added such as amylase, note col. 24, lines 15-20. Also the composition is typically formulated in an amount of 0.5 to 10% by weight, note col. 35, lines 1-5.

DE003500187 teaches product comprising amino acid additives. Note page 9, line 1, wherein DL-methionine is disclosed.

The claims differ from Kaesler in that microorganism as the probiotic as well as specific microorganism probiotic and specific enzymes are not disclosed.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine the teachings of Kaesler and Farmer and newly cited DE003500187 in order to provide for a product comprising sorbic acid and

probiotic microorganism selected from *Bacillus subtilis* to add to feed and further to select an amylase to combine therein as well as amino acids, such as lysine and others. To select for sorbic acid in an amount of about 90% is clearly within the skill of an ordinary artisan especially when the art teaches that carboxylic acid are desired in those amounts. To provide for sorbic acid in that amount is an obvious modification. The cited references teach these ingredients to be comprised by a product and thus, are well known. Further, to vary weight ratio of sorbic acid and probiotic is also an obvious modification and routine optimization in the art of desirable amounts of well known ingredients.

One of skill would have been motivated to select for the number of viable cells because the art teaches these amounts and to select for at least 90% by weight of sorbic acid is an obvious modification of Kaesler et al since the acid is comprised of the product taught therein is present in at least that amount. Clearly one of skill would have been motivated to combine these ingredients for addition to feedstuff. The claims are *prima facie* obvious over the cited prior art.

Response to Arguments

Applicant's arguments filed January 24, 2005, have been fully considered but they are not persuasive because of those reasons set forth above which show that sorbic acid in amounts of 90% is obvious and routine in the art. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is

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some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In this case, one of skill would have recognized the combination of probiotic and sorbic acid to be provide successful results based upon the teachings of the cited prior art. Also to select for acid resistant probiotics is clearly obvious because the product contains an acid, of course, the sorbic acid as claimed herein. Thus, one of skill would have expected that the probiotic to be effective would need to be acid resistant.

Further, to not include a neutralizing agent is certainly expected because the acid is present and one of skill would not have desired to neutralize the active ingredients. The newly cited DE reference clearly teaches the presence of amino acids. Each of the claim limitations are taught, or at least suggested, by the newly cited prior art combination. The claims are *prima facie* obvious for these reasons and for those of record.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States

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only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claim 17 is rejected under 35 U.S.C. 102(e) as being anticipated by Kaesler et al.

Claim is drawn to a product comprising sorbic acid and probiotic, as discussed above.

Kaesler et al teach a product comprising sorbic acid and (=probiotic). Note col. 3, line 5 and line 59. Further it is added to food, col. 4, lines 63, to form a product.

The claim is identical to the cited disclosure and are considered to be anticipated by the teachings therein.

Applicant's submission of the amendment prompted the new ground(s) of rejection under 37 CFR 1.109(b) presented in this Office action. Accordingly, THIS ACTION IS MADE FINAL. See MPEP § 706.02(l)(3). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

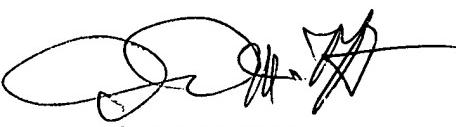
No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 571-272-0924. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Deborah K. Ware
April 16, 2005


DAVID M. NAFF
PRIMARY EXAMINER
ART UNIT 1651